Additional material for chapter 29
Copyright

When is a photograph commissioned?
The Act does not define in section 85 what a ‘commission’ is.

Case study: In 2012 the High Court judge Mr Justice Tugendhat rejected argument that photos of a civil partnership ceremony taken by a male friend of one of the couple to be his (the photographer’s) wedding present to them were ‘commissioned’ The judge said that ‘commissioning in section 85 means that there must be an obligation on the part of the commissioned party to produce the work and an obligation on the part of the commissioning party to pay money or money's worth’ (Trimingham v Associated Newspapers [2012] EWHC 1296 QB).

Fixtures lists, databases, and tide tables
The ‘skill, judgement and labour’ and ‘selection and arrangement’ in compiling fixture lists - for example, of the Premier League football matches - meant the leagues which compiled them could claim copyright in them. Professional football leagues in the UK required the media to pay fees to reproduce the lists on sports pages, etc. But a long-running and complex legal dispute ended in 2012 when the European Court of Justice (ECJ) ruled that, in the circumstances of that case, there was no copyright in fixture lists, because there was insufficient ‘originality’ in their creation. The ruling - in Football Dataco and others v Yahoo! UK Ltd and others, C-604/10 - interpreted a European Union directive on copyright in databases. As McNae’s chapter 1 explains, EU directives are a source of law, designed to ‘harmonise’ throughout the EU some field of law. The effect of this ECJ ruling is that the meaning of the term ‘originality’ in copyright law applying to databases is now linked more closely to the quality of ‘creativity’ than it had been in English and Welsh law.

But the complexities of EU law, and scope for each EU nation to apply it with some discretion, mean that a ruling in one case concerning copyright in compilation of data may not apply in the different circumstances of another. It depends on what may be ruled about the degree of ‘originality’. Also, there is a separate ‘sui generis’ right protecting the investment made to create some types of database (but this does not apply to fixture lists).

Copyright continues to be asserted in tide tables by organisations which compute tide times. They licence councils and media organisations to reproduce them.

TV and radio listings
Section 176 of the Broadcasting Act 1990 says those who provide a broadcast service, and own the copyright in the programme listings, must make the listing information available, through a copyright licensing scheme, to any organisation wishing to publish it, but can charge.

Section 45 protection of court reporting
The High Court of Judiciary in Scotland ruled in 2012 that the section 45 defence, the open justice principle and rights in Article 10 of the European Convention on Human Rights protected media publication of photos which featured as prosecution evidence in a Glasgow High Court murder trial, even though the copyright owner - the defendant - objected to their publication (BBC (in the case of HM Advocate v Kimberley Mary Hainey) Petitioners) [2012 S.C.C.R. 354]). The photos were family shots of the baby Declan Hainey, taken by his mother Kimberley. The High Court jury convicted her of murdering him, but in 2013 the Court of Criminal Appeal quashed the conviction.

Orphan works
The Enterprise and Regulatory Reform Act 2013 amended the Copyright, Designs and Patents Act 1988 to allow the introduction of schemes for the licensing of ‘orphan works’ - that is, works for which the copyright owner (for example, the creator) cannot be located or his/her identity is not known. The aim of
this law is to help public and private bodies which hold such works make copies available to the public, including for commercial reasons. Under the Act regulations give the Secretary of State for Business, Energy and Industrial Strategy power to appoint appropriate bodies to license such copying of orphan works. The Intellectual Property Office (IPO) was appointed to this role. There is a requirement for a diligent search to be made to attempt to find the copyright owner before a work qualifies as an orphan work, and provision for any copyright owner who subsequently emerges to be able to claim a copyright fee from the licensing body.

When Parliament debated the detail of the Act organisations representing journalists and news agencies expressed concern that the search for the copyright owner might not be diligent enough. The fear was that, for example, a photographer could discover that one of his/her published photos was declared an orphan work after a copy was ‘found’ on the internet with information asserting his/her copyright stripped out. If the photo was deemed to be an orphan work it could be exploited without the photographer’s permission. Critics of this change in the law said it would add to the financial burdens of news agencies and journalists because they would have to ‘register’ their photos and footage with a registry organisation to avoid them being deemed orphan works, and that the new law reflected the interests of multi-national organisations such as Google, which wanted to exploit ‘orphan works’, rather than safeguard creators’ interests. The Government insisted the law contained sufficient safeguards to be fair, and that registration would not be necessary.

See Useful Websites, below, for the regulations and Government guidance on orphan works.

**The Meltwater case**

The *Meltwater* case shows the impact of developments in European jurisprudence on what in copyright law can be considered to be a ‘substantial part’ of protected text.

**Case study:** The High Court in London ruled in 2010 that subscribers to Meltwater News, a commercial monitoring service, were infringing the copyright of UK national newspapers. The court heard that in response to chosen search terms, Meltwater would electronically ‘scrape’ the headlines of and short text extracts from articles, including extracts containing the terms, from newspapers’ websites. It made copies of this material available to subscribers by email or through its own website, with a hyperlink to the relevant newspaper’s webpage for the article to be read there in full. Mrs Justice Proudman ruled that some headlines could, in their own right, be protected by copyright, as were many of the text extracts copied by Meltwater in a transmission process which meant its subscribers too made copies. She drew on a 2009 ruling in which the European Court of Justice ruled that a single extract of 11 consecutive words from a newspaper article could be protected by copyright if the work had sufficient originality (*Case C-5/08 Infopaq International A/S v Danske Dagblades Forening* [2010] FSR 495), and she noted that the ‘capture’ in Meltwater’s system was copying many extracts. Mrs Justice Proudman said that the ECJ had made clear ‘that originality rather than substantiality is the test to be applied to the part extracted. As a matter of principle this is the only real test.’ Her ruling, which was upheld by the Court of Appeal, meant that the newspapers’ bargaining power to charge Meltwater for its use of their headlines and text was improved. See also McNaes, pp. 368-369 ‘What is “original”?’ and McNaes, pp. 373-374 ‘What is “substantial”?’

**News agency won damages**

**Case study:** The Solent News agency was paid an undisclosed sum by the Press Association to settle a dispute over a 237-word report of an interview Solent had obtained with a murder victim’s father. Solent had supplied it to the *Southern Echo*, and said that PA had ‘lifted it’ from the Echo’s website without permission. PA said it had acted ‘in good faith’ (*Press Gazette*, August 3, 2011).

**Case involving fair dealing defences**
Case study: In 2005 a news photo agency sued the BBC, alleging copyright infringement. A BBC programme had shown, without its consent, 14 of its photos of celebrities David Beckham and his wife Victoria, some including their children. The BBC succeeded with the defence of fair dealing for the purpose of criticism or review for 13 of the pictures, each of which appeared in the programme for a few seconds at most with ‘sufficient acknowledgement’ of the photographer’s identity. The programme was an examination of tabloid journalism methods, and of celebrities who apparently contrived to pose for photographers by arrangement. The High Court judge accepted the BBC’s argument that the defence allowed criticism of the ‘ideas or philosophy’ manifest in the copied photos, and agreed that the 14th photo, small and seen in a brief image as part of a newspaper page, was covered by the ‘incidental use’ defence (Fraser-Woodward Ltd v BBC [2005] EWHC 472 (Ch)).

Case study: In 2005 the Mail on Sunday published substantial extracts of a hand-written journal kept by Prince Charles, copies of which were leaked to it by one of his former employees. In these extracts, dating from 1993, the Prince’s private thoughts about official events that year included his description of Chinese Communist officials as ‘appalling old waxworks’. Charles regularly sent copies of the journals to friends, but they were not intended for publication. He sued the paper to stop further publication. It attempted to use the defence of fair dealing for the purpose of reporting current events. But the Court of Appeal said the defence failed because much of the Mail’s quoting of the journals had no bearing on current events. The paper also tried to use the defence of fair dealing for the purpose of criticism or review. But the Court said this could not succeed because Prince had not chosen to make the extracts available to the public (HRH Prince of Wales v Associated Newspapers Ltd [2006] All ER (D) 335 (Dec)). Another factor in the paper losing the case was that the leaking of the journals by the ex-employee was a breach of confidence. McNae’s chapter 25 explains the law on confidentiality.

Case study: Paddy Ashdown, when leader of the Liberal Democrats, kept a private diary. After stepping down as leader he decided to publish it. But before he did, The Sunday Telegraph published, from a leaked copy, verbatim quotes from a confidential minute he made of a discussion in 1997 with Labour Prime Minister Tony Blair and two other senior politicians on the idea of a coalition Cabinet. Lord Ashdown sued for breach of copyright. The Sunday Telegraph, which had quoted verbatim or nearly verbatim some 20 per cent of the nine-page minute, attempted to use both fair dealing defences. The Court of Appeal rejected both defences, ruling that there was no criticism or review of the minute as a literary work – the criticism was of the actions of Blair and Ashdown. It also ruled that arguably the 1997 meeting could be regarded in 1999 as a current event, but that ‘one or two short extracts’ of verbatim quotes from the minute would have sufficed to make the paper’s account authoritative. But the newspaper had extensively ‘filleted’ the minute, in furtherance of its commercial interests, which competed with Ashdown’s plan to sell his memoirs. It was also material that the minutes were leaked in breach of confidence (Ashdown v Telegraph Group Ltd [2001] All ER (D) 233 (Jul)).

Case study: In 1998 Carlton TV, part of the ITV network, successfully used both fair dealing defences after being sued for copyright infringement by a German TV channel. Carlton had in 1996 broadcast a programme examining chequebook journalism. This featured a British woman who that year, when pregnant with eight live embryos after fertility treatment, sold exclusive interview rights to the German channel for about £30,000. The Court of Appeal said Carlton’s use of a 30-second clip of an interview with her, copied from a nine-minute item broadcast by the German channel, was not unfair. Carlton had shown the German channel’s logo and the name of the relevant German programme, which was ‘sufficient acknowledgement’ of the work and author. Carlton’s use of the clip was therefore protected by the defence of fair dealing for the purpose of criticism, in that its programme as a whole was made for the purpose of criticism of works of chequebook journalism in general. The Court added that the use of the clip was also protected by the defence of fair dealing for the purpose of a reporting a current event, which was the fact that the woman had sold the interview rights (Pro Sieben Media AG v Carlton Television Ltd [1998] All ER (D) 751).

Cases involving the public interest defence
As explained above, in *BBC (in the case of HM Advocate v Kimberley Mary Hainey) Petitioners* the High Court of Judiciary in Scotland ruled that section 45 of the 1988 Act meant that the media could publish photos which had been prosecution evidence in a murder trial. The judge, Lord Woolman, added the view that ‘the public interest in the proper and full reporting of this case is sufficient to “trump” any right of the copyright owner’.

In *Lion Intoximeters v Evans* [1985] QB 526 - see *McNae’s*, p. 327 - the Court of Appeal ruled that the *Daily Express*’s publication of the breathalyser company’s internal memo would be in the public interest, and so should not be constrained because the company claimed breach of copyright or because it claimed breach of confidence.

**Damages may be higher if infringement flagrant**

The level of damages awarded by a court may reflect its view that there has been a flagrant breach of copyright.

**Case study:** In 2002 *The Sun* was ordered to pay £10,000 damages for infringement of copyright in a photograph it used in a report about a convicted killer being given rehabilitative day release from Rampton secure hospital. A copy of the photo was leaked to the paper from the man’s confidential, medical notes. The judge deemed the market value of the photo to have been £450 had the copyright owner wanted to sell it, but awarded £10,000 to that owner, the NHS trust responsible for the hospital, to reflect the ‘flagrancy’ of the infringement (*Nottinghamshire Healthcare NHS Trust v News Group Newspapers* [2002] EWHC 409).

**Other exceptions, and the Act’s complexity**

The 1988 Act allows some types of copying for private research, education, by libraries and in domestic use - for example, a household copying TV broadcasts for viewing later. A specialist book is needed to understand some of the Act’s provisions, including the rights of live performers to restrict broadcast of their performances. See the Book List in *McNae’s*, p 481.

**Useful Websites**

https://www.gov.uk/government/collections/orphan-works-guidance

Government guidance on ‘orphan works’


The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014


‘Explanatory Notes’ for the 2014 regulations